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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 784

HUGH GANT,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

WARREN O. COLEMAN,
Counsel for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 784

HUGH GANT,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Hugh Gant, respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit, entered in the aforesaid entitled cause on December 18, 1945 (R. 24), rehearing denied January 16, 1946 (R. 26), affirming the judgment of the United States District Court for the Southern District of Alabama, overruling a motion to set aside and annul a void judgment rendered against him on March

28, 1938, after conviction and sentence for a violation of the National Bank Robbery Act (R. 14).

Opinion of the Court Below

The District Court (McDuffy, D. J.) filed no opinion. The Circuit Court of Appeals, in affirming, wrote an opinion (Per Curiam, R. 23), not yet officially reported.[1]

Jurisdiction

The judgment of the Circuit Court of Appeals, affirming the conviction of petitioner was entered on December 18, 1945 (R. 24), rehearing denied January 16, 1946 (R. 26). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347). See also Rule 11 of the Criminal Appeals Rules promulgated by this Court on May 7, 1934. The District and Circuit Courts had jurisdiction of the motion for order to vacate void judgment.[2]

Statute Involved

The National Bank Robbery Act (12 U. S. C. 264(c)(1) and 588A and 588B(a), (b)), reads in part, as follows:

> (588B(a)) "Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of any bank, * * * shall be fined not more than $5000.00 or imprisoned not more than 20 years, or both."

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[1] The opinion of the Circuit Court is as follows: "Pretermitting the question of dismissing this appeal, and deciding the case on its merits, the judgment appealed from is affirmed on the authority of *Pyle* v. *Johnson*, 137 F. (2d) 869."

[2] c/f *Bowen* v. *U. S.*, (5th. Cir.) 134 F. (2d) 845, and cases cited therein.

(588B(b)) "Whoever, in committing, or in attempting to commit, any offense defined in subsection (a) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not less than $1000.00 or more than $10,000.00 or imprisoned not less than 5 years nor more than 25 years, or both."

(Sec. 588A) "* * * as used in Sec. 588B of this title the term 'bank' includes * * * any insured bank as defined in subsection (c) of Section 264 of this title."

(Sec. 264(c)(1)) "The term 'State bank' means any bank * * * which is engaged in receiving deposits and which is incorporated under the laws of any State * * *"

Statement of the Case

The indictment (R. 2) challenged here, in four counts, sought to charge violations of the National Bank Robbery Act, quoted above. A general verdict of guilty was returned by a jury (R. 10). The sentence, imposed on March 28, 1938 was for a term of 25 years, to begin at the expiration of another sentence, imposed on February 8, 1938, by the United States District Court for the Northern District of Florida (R. 8-11).[3]

All four counts cover the same transaction; counts one and three charge the robbery, differing only in naming the bank employees present at the time of the robbery. Counts two and four add the aggravating circumstances, by alleging the use of a pistol and putting life in jeopardy, again differing only in the names of the bank employees present at the time of the robbery.

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[3] Petitioner has already served about 8 years on the Florida sentence, and that sentence, with time off for good conduct, will expire late in 1954.

Specification of Error

The court erred in overruling petitioner's contention that he was deprived of his right, granted by the Sixth Amendment to the Constitution,[4] to be informed of the nature and cause of the accusation.

The indictment, under Sec. 588 of Title 12 U. S. C. (bank robbery), which alleges that the bank involved was a certain State bank, the deposits of which "were then and there insured by the Federal Deposit Insurance Corporation" is fatally defective by reason of its failure to set out every essential element constituting the crime; there being no allegation to identify the Federal Deposit Insurance Corporation as being an agency of the United States, or as having been created under the provisions of Sec. 264, of Title 12, U. S. C.; thus rendering the indictment, sentence, and judgment of conviction thereunder totally void.

Reasons Relied upon for the Allowance of the Writ:

In overruling petitioner's contention that the sentence and judgment was totally void because the indictment failed to set out every essential element constituting the crime denounced by the National Bank Robbery Act (12 U. S. C. 588B, Subsections (a) and (b)) which indictment did not allege that the state bank was insured by an agency or instrumentality of the United States, which allegation was essential to protect petitioner's rights under the Sixth Amendment, the Circuit Court of Appeals has decided an important question of federal constitutional law which has not been, but should be, settled by this Court.

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[4] The Sixth Amendment provides: "In all criminal prosecutions, the accused shall * * * be informed of the nature and cause of the accusation;"

The indictment (R. 1 & seq.), which sought to charge petitioner with violating the National Bank Robbery Act (12 U. S. C. 588B, Subsections (a) and (b)), after charging the robbery, etc., alleged that "the said Farmers & Merchants Bank being then and there engaged in the business of receiving deposits, and being incorporated under the laws of the State of Alabama, and being a bank the deposits of which were then and there insured by the Federal Deposit Insurance Corporation";

There is no allegation to the effect that the Federal Deposit Insurance Corporation is an agency or instrumentality of the United States, nor is there an equivalent allegation such as that "the Federal Deposit Insurance Corporation was created by the laws of the United States," or even the allegation "Federal Deposit Insurance Corporation of the United States."[5]

It is earnestly submitted, that unless the title "Federal Deposit Insurance Corporation" can mean only the governmental agency created under the provisions of Sec. 264, of Title 12, United States Code, and cannot mean a state, private or other non-federal agency or corporation, the prosecution is not excused from setting out this essential element constituting the crime.[6]

The Circuit Court found that this question was foreclosed by the holding in *Pyle* v. *Johnson, Warden* (9 Cir.) 137 F. (2d) 869.

The Circuit Court, however, erred in not considering the distinctions made between the issues in the case at bar, and

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[5] Because of the qualifying phrase "of the United States" identifying the "Federal Deposit Insurance Corporation" as the governmental agency, a similar indictment was properly held to be sufficient in *Hewitt* v. *U. S.* (8 Cir.) 110 F. (2d) 1.

[6] A serious jurisdictional question also arises in the absence of such allegation, as the federal courts have no jurisdiction to punish robberies of state banks. The jurisdiction arises only when the governmental agency insures the state bank's deposits.

the issues in the *Pyle* case, as follows: (1) The proceeding in the *Pyle* case was by petition for writ of habeas corpus, and the court there held that an indictment could not be thus collaterally attacked; that being the basic reason for the refusal of the writ by the court in that case. Here a direct attack was made on the indictment, in accord with the established procedure laid down by the Fifth Circuit Court of Appeals.[7] (2) The finding on the merits in the *Pyle* case was *obiter dicta,* clearly decided *en passant,* incidentally and as a makeweight as it was unnecessary to decide the merits in view of the court's holding that the question could not be raised at all in a *habeas corpus* proceeding.

Moreover, in reaching its conclusion on the merits in the *Pyle* case, the Ninth Circuit Court of Appeals gave consideration to only part of the Banking Act of 1935, as amended (12 U. S. C. 264) (v) (1), prohibiting the use of the name "Federal Deposit Insurance Corporation" as the name under which a business can be conducted, but inadvertently overlooked and thus erroneously gave no effect to the section of the same Act containing the proviso (12 U. S. C. 585) which specifically permits the use of the name by any one who was engaged in business under such name or title prior to May 24, 1926.[8]

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[7] *Bowen* v. *U. S.* (5 Cir.) 134 F. (2d) 845.

[8] This contention could not be lightly set to one side on the theory expressed in the *Pyle* case that "academically speaking, there is a mere possibility that an insurance concern having the same name as that mentioned in the indictments and in the statute, but having no connection with the federal government, might have been the insurer," because Congress did not treat it as a mere academic possibility, but on the contrary took cognizance of the recognized fact that firms did operate under the name, "Federal Deposit Insurance Corporation," in enacting the banking act of 1935. See 74 Congress Aug. 23, 1935, H. R. 7617. Public No. 305, 49 Stat. 704, 719. That amendment introduced the name "Federal Deposit Insurance Corporation," and is the amendment to 12 U. S. C. 585, and also created 12 U. S. C. 264 (v)(1). 12 U. S. C. 585 reads in part,

The question here raised is not that posited by the prosecution in the brief filed in the Circuit Court to the effect that the true test of the sufficiency of the indictment is not whether it could have been made more certain, and that the omission here complained of falls within the purview of 18 U. S. C. 556, providing that indictments shall not be deemed insufficient by reason of any defect or imperfection in matters of form only.

We contend that the omission goes to the validity of the indictment, and for that reason the indictment is fatally defective; its omission goes to the basis of the jurisdiction of the federal courts. We do not merely say that the indictment could have been made more certain, we say that an essential element of the offense was not set forth in the indictment. This is not a question of mere vagueness of the indictment, it is fundamental, calling for the full application of the Sixth Amendment. This Court, in *Bruno* v. *U. S.*, 308 U. S. 287, has clearly defined the history, background and purpose of the so-called "harmless error enactment", holding that it applied to matters pertaining to the mere "etiquette of trial," and "minutia of procedure"—that it could not operate to deprive an accused of fundamental constitutional or statutory rights.

Nor do we consider that the court in the *Pyle* case, *supra*, properly passed upon the question by making the unreasonable and illogical statement: "An indictment need not negative every conceivable theory that might combat the validity of the pleading", because, by no stretch of the imagination, could it be said that the omitted allegation, "which said Federal Deposit Insurance Corporation is an

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"Provided, however, that the provisions of this section [prohibiting the use of the name Federal Deposit Insurance Corporation] shall not apply to any • • • firm, partnership or person actually engaged in business under such name or title prior to May 24, 1926." (May 24, 1926, Ch. 377, Sec. 2; 44 Stat. 628; Aug. 23, 1935, Ch. 614, 203(a) 332, 49 Stat. 704, 719.

agency of the United States", or "said Federal Deposit Insurance Corporation was created under the provisions of Sec. 264 of Title 12,—United States Code", or similar equivalent allegation, is a negative averment. It is clearly an affirmative allegation of an essential ingredient of the offense; it is also clearly an affirmative allegation setting forth an essential jurisdictional fact. Nor do we agree with the court's further statement in the *Pyle* case, probably brought about by the heinous character of the offense there charged that, "It may be well to state that the great writ of habeas corpus is not intended as a swinging gate of jail delivery whose latch may be tripped by every fine technicality."

The answer to this is best expressed in the language used in *Fina* v. *U. S.*, (10th Cir.) 46 F. (2d) 643, 644, 645, • • • "the error here complained of is a denial to defendant of his constitutional right, and the denial to defendant on trial of his constitutional rights, guaranteed to him by the Constitution is at all times deemed to be prejudicial. To preserve such rights from usurpation the framers of our Constitution deemed them of such solemn importance in the doing of justice as to place their protection under the sheltering aegis of our organic law."

As a remonstration to the contention of the government that the defendant was in fact guilty, and that the error complained of was a "mere irregularity that was not prejudicial to him and that this conviction should be affirmed", the court in the *Fina* case, *supra*, expostulated as follows:

> "However, the brief in this case was being prepared, addressed to and to be presented to a court of justice to aid that court in the doing of justice to one accused of the commission of a crime—a felony. Hence, in all reason and good conscience, he, and all officers of our courts of justice, should be mindful of the fact we are now living in a period of our country's life when crime

> is rampant, a time in which there is a rapidly growing outcry against crime by all good citizens; a time in which there is an ever increasing insistence upon the part of the public when a crime is discovered to have been perpetrated to cry out, as of old, 'Give us a sacrifice to wipe out this blood.' At such a time it is entirely too dangerous to individual liberty, too dangerous to the safety of the citizen, which is or should be the supreme concern of government, to ignore or to attempt to strike down our constitutional safeguards. Indeed, today, more than ever before in our country, our constitutional guaranties, achieved at so much sacrifice of blood and suffering, and written by the strong hands of noble men, become of transcendent importance, guaranteeing, as they do, to the innocent, protection, to the guilty, a fair and impartial trial."

Since the bank robbed was a state bank, and the robbery of such bank, unless it is insured by the "Federal Deposit Insurance Corporation," is not a federal crime, the simple question here at issue rests on whether an allegation setting forth that the "Federal Deposit Insurance Corporation" is in fact the governmental agency bearing that title is an indispensable fact to be alleged. We submit that congress in making the proviso in 12 U. S. C. 585 took cognizance of the existence of non-federal agencies that could operate under the name "Federal Deposit Insurance Corporation", thus the courts would not be justified in failing to follow the policy plainly set forth by Congress in that deliberately enacted proviso. There must have been a reason for Congress's action in permitting the use of the name to those who were using it in 1926. To artificially extend the reasoning of the *Pyle* case would impute to Congress the doing of a vain and useless thing in solemnly enacting the exceptions to the general rule which prohibits the use of the name, "Federal Deposit Insurance Corporation", which was ignored entirely in the *Pyle* case.

We submit that a simple test, to determine quickly whether the allegation is essential is to ask the question, "would the government be required to prove on the trial of the case that the state bank was insured by the federal governmental agent"? We do not believe that anyone would dream of arguing that such proof was unnecessary to sustain jurisdiction and warrant conviction in this case. If that item of proof is necessary, it is because it is an essential element of the offense, and if it is an essential element of the offense, it must be set out in the indictment. It is elementary that the offense must be made to appear from the indictment, without going further, that the acts charged will if proved support a conviction for the alleged offense,[9] and that no essential element of the crime can be omitted without destroying the whole pleading.[10] This court has said that, "no indictment is sufficient if it does not allege all the ingredients of which the offense is composed."[11]

A case particularly worthy of study as analogous to that of petitioner's is *Shaw* v. *U. S.* (8th Cir.) 292 F. 339. The indictment there failed to allege that a National Bank was a Federal Reserve member bank. The court finding that an indispensable element of the offense was that the National Bank, of which the accused was an officer and agent, was at the time that the acts were committed, a Federal Reserve or member bank.

It is especially noteworthy that the matter was taken notice of by the court *ex propria motu*, the indictment not

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[9] *U. S.* v. *Cruikshank*, 92 U. S. 542; *U. S.* v. *Potter* (1 Cir.) 56 F. 83, 89; *Fontain* v. *U. S.* (9 Cir.), 262 F. 283; *Miller* v. *U. S.* (8 Cir.) 133 F. 337.

[10] *U. S.* v. *Hess*, 124 U. S. 483.

[11] *U. S.* v. *Cook*, 17 Wall. 168; see also *U. S.* v. *Simmons*, 96 U. S. 360; *U. S.* v. *Britton*, 108 U. S. 199; *Pettibone* v. *U. S.*, 148 U. S. 197; *Dunbar* v. *U. S.*, 156 U. S. 185, 190; *Fitzpatrick* v. *U. S.*, 178 U. S. 304; *Ledbetter* v. *U. S.*, 170 U. S. 606; *Moore* v. *U. S.*, 160 U. S. 268; *Evans* v. *U. S.*, 153 U. S. 584.

having been challenged by any pleading, assignment of error, argument or brief. The court said:

> "The omitted matter was not, we think, of form only and curable by the statute of jeofails. • • • But substantive, an element of the offense defined.
>
> "It is a general rule, that from the face of the indictment itself it must judicially appear to the court that an offense has been committed. The omission of any fact or circumstance necessary to constitute the offense will be fatal.
>
> "Wheaton on Criminal Law (7th & Rev. 285): 'This must be so on principal, because a verdict is of no more aid than a plea of guilty when the court comes to inquire whether punishment may be inflicted.'
>
> "Chief Justice Marshall, in the Happet, 7 Cranch, 389, 394 said 'that one of the reasons for the rule that the accusation on which the prosecution is founded should state the crime which is to be proved, and state such a crime as will justify the judgment to be pronounced, was that the court may see with judicial eyes that the fact, alleged to have been committed, is an offense against the laws, and may also discern the punishment annexed by law to the specific offense.' "

See also *U. S.* v. *Dooley*, 11 F. (2d) 428, 429, stating:

> "By the weight of authority, the rule is that from the indictment itself it must judicially appear that an offense has been committed. The court cannot take judicial notice that the First Nat'l. Bank of Rockville Center is a Federal Reserve Bank or member bank."

Nor can an omission of an essential element be supplied "by intendment or implication, and the charge must be made directly and not inferentially, or by way of recital, and such defects are not cured by verdict." [12]

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[12] *Harris* v. *U. S.*, 104 F. (2d) 41, 45; c/f *Jones* v. *U. S.*, 19 F. (2d) 316.

It has frequently been held that an indictment may be challenged for the first time on review, where there is omission of an essential element of offense.[13]

This point is jurisdictional, and does not come too late, for the very basis of the judgment is the indictment, which, we contend, charges no federal offense; nor can this constitutional right be waived, at least not impliedly. The only method of waiving such rights recognized as proper and legal by this Court arises in those cases where the defendant is fully informed of all of his fundamental constitutional rights, and being so informed, knowingly and in a formal legal manner deliberately and affirmatively waives that right.[14]

Conclusion

For the foregoing reasons, petitioner, by his solicitor, respectfully prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Fifth Circuit to the end that the cause may be reviewed and determined by this Court, and the judgment of the Circuit Court of Appeals reversed.

Respectfully submitted,

WARREN O. COLEMAN,
408 Whitney Building,
New Orleans, 12, Louisiana,

Solicitor for Petitioner.

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[13] *Keys* v. *U. S.* (8 Cir.) 126 F. (2d) 181; *Harris* v. *U. S.* (8 Cir.) 104 F. (2d) 41, 43.

[14] c/f *Glasser* v. *U. S.*, 315 U. S. 60; *Patton* v. *U. S.*, 281 U. S. 276, 312; *Johnson* v. *Zerbst*, 304 U. S. 458; *Dillingham* v. *U. S.* (5 Cir.) 76 F. (2d) 36, 39.